IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1926.

No. 211.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

ALFRED KLESSNER, doing business under the name "SHADE SHOP," HOOPER & KLESSNER,
Respondent.

BRIEF FOR RESPONDENT.

This case is here on writ of certiorari to review the action of the Court of Appeals of the District of Columbia in dismissing the Federal Trade Commission's petition for the review and enforcement of its previously-made order that Respondent cease and desist from certain alleged unfair trade practices; the court's decision having been based upon a lack of jurisdiction to review and enforce such order. (See Opinion of the Court of Appeals, R. p. 417.)

The Facts.

The statement of facts in Petitioner's Brief (pp. 8 and 9) is, for the most part, correct; but, if it is meant

and intended to charge that the evidence disclosed by the record makes out against the Respondent a case of unfair competition, then we except to the charge. However, the statement to which we take exception goes to the merits; and, as the case here involves merely a question of jurisdiction, we accept as correct the statement of facts in respect of the question here to be determined.

Argument and Authorities.

But one question is here presented for consideration, namely, did the Court of Appeals of the District of Columbia err in holding that it is without jurisdiction to review the action of the Federal Trade Commission and to uphold and enforce, or reverse, such action? In answering that question in the negative, the Court of Appeals based its decision on the ground that it is not a "Circuit Court of Appeals of the United States" within the meaning of the Federal Trade Commission Act which, in express terms, provides that the action of the Commission may be reviewed on petition of the Commission (or a losing respondent before it) to the "Circuit Court of Appeals of the United States" in the circuit where the claimed unfair trade practices are indulged in, or where the person, firm, or corporation involved resides. (NOTE: The pertinent provisions of the Federal Trade Commission Act are set out at page 2 et seq., of the Commission's brief; hence they will not be repeated herein.)

For convenience, the Federal Trade Commission will be hereinafter referred to as the Commission, and the person on whose behalf this brief is filed as the Respondent.

POINT I.

The Court of Appeals of the District of Columbia is a court of the United States; but it is not a constitutional court of the United States in the same sense that the Circuit Courts of Appeals of the United States and the United States District Courts are constitutional courts, nor does it possess, in respects too numerous to mention, the same jurisdiction possessed by the Circuit Courts of Appeals of the United States.

(a) The Circuit Courts of Appeals of the United States were created and have their existence in virtue of the power conferred upon the Congress by Article III, Sec. 1 of the Constitution, providing that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." They have their existence under the provisions of Sections 116 to 135, inclusive, of the Judicial Code of the United States (5 Fed. Stats., Ann., 2d Ed., p. 599 et sequence). There is provided one of such courts for each of the nine judicial circuits established by the sections in question; and the Chief Justices and Associate Justices of the Supreme Court of the United States are allotted among the nine circuits pursuant to order of the Supreme Court. It is to be noted that the Court of Appeals of the District of Columbia is nowhere mentioned in the part of the Judicial Code creating the United States Circuit Courts of Appeals; nor are any of the courts of the District of Columbia mentioned in the parts of the Judicial Code which establishes and defines the jurisdiction of the United States District Courts (Judicial Code, secs. 1-115, inc., 4 Fed. Stats.,

Ann., 2d Ed., pp. 815-838, and 5 Fed. Stats., Ann., p. 1 et seq.). The Judicial Code also ordains and establishes The Court of Claims and defines its jurisdiction (Judicial Code, secs. 136-187, inclusive, 5 Fed. Stats., Ann., 2d Ed., p. 646 et seq.); The Court of Customs Appeals, Judicial Code, secs. 188-199, inclusive, 5 Fed. Stats., Ann., 2d Ed., p. 686 et seq.); fixes the number of justices, etc., of the Supreme Court of the United States (Judicial Code, secs. 215-255, inclusive, 5 Fed. Stats., Ann., 2d Ed., pp. 701 et seq.). In other words, Congress created those several courts as courts of the United States under the provisions of Article III, Sec. 1 of the Constitution; and they constitute, and have always constituted, a judicial system for the administration of the laws of the United States generally throughout the Union entirely separate and distinct from the judicial system of the District of Columbia.

(b) The Court of Appeals of the District of Columbia was created and has its existence in virtue of Article I, Section 8, Clause 17 of the Constitution, providing that "Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever over" the District of Columbia. Thus, an entirely separate and distinct judicial system has been created and exists for the administration of justice at the seat of Government. True, Congress has from time to time, and in certain instances, seen fit to clothe the courts of the District of Columbia with special jurisdiction, but it never has declared that the Courts of the District of Columbia are courts of the United States in the same sense as the United States District and Circuit Courts of Appeals. For example, the Supreme Court of the District of Columbia has authority to entertain and determine suits for the recovery of penalties for

violation of the Safety Appliance Acts; and Section 62 of the Code of Law for the District of Columbia provides that the justices of the Supreme Court of the District shall, in addition to the powers and jurisdiction possessed and exercised by them *as such justices*, severally possess the powers and exercise the jurisdiction possessed and exercised by the judges of the Circuit and District Courts of the United States. And the Court of Appeals of the District of Columbia has been, among other things, given jurisdiction to exercise appellate jurisdiction over final decisions of the Patent Office; but, in every such instance, Congress has not only plainly and unequivocally conferred such jurisdiction, but it has at all times maintained the clearest and most unmistakable distinction between the courts of the District of Columbia and the Courts of the United States generally,—they have always been treated as two separate and distinct judicial systems. As a further example, the Code of Law for the District of Columbia, for the enforcement of which the Supreme Court of the District is the principal court of original jurisdiction, provides that the common law, all British Statutes in force in Maryland on February 2, 1801, the principles of equity and admiralty, all general acts of Congress *not locally inapplicable to the District of Columbia*, etc., as well as the provisions of said Code, shall be enforced, unless repealed by the Code or later enactments of Congress. Thus it is seen that the Courts of the District of Columbia have common-law jurisdiction, while the District Courts and Circuit Courts of Appeals of the United States have no such jurisdiction; and the former also enforce the Code of the District, while the latter do not. Of course, it goes without saying that, while Congress has clothed the justices of the Supreme

Court of the District of Columbia with the power and jurisdiction of United States District Judges, in addition to the power conferred upon them by the District Code, such additional power does not make them United States District Judges; for they have their being and existence under an entirely different provision of the Constitution. If they could be said to be United States District Judges because of such added power, then some of our present Supreme Court Justices would find themselves in embarrassing situations; for at least a part of them do not, or at least did not always, reside in the District of Columbia; while the Judicial Code, Sec. 1, Vol. 4, Fed. Stats., Ann., 2d Ed., p. 815, provides that the District Judges shall reside in the Districts where they are appointed and preside. And it is declared to be a high misdemeanor to violate this provision. There is no such provision in respect of the Judges of the Courts of the District of Columbia; and they are appointed by the President without regard to their residence.

The Court of Appeals of the District of Columbia was brought into being, and its jurisdiction is defined, by the Act of February 9, 1893, 27 Stat. L., 434; and, almost exclusively, it exercises appellate jurisdiction over the *nisi prius* courts of the District. Its jurisdiction is limited by Congress; and it may only issue prerogative writs in aid of the appellate jurisdiction expressly conferred. (D. C. Code., Secs. 221-232, inclusive.)

We have no difference of opinion with counsel for the Commission that the Court of Appeals of the District of Columbia is a *court of the United States;* but we do most respectfully insist and earnestly urge that it is neither a constitutional court in the sense that the

other courts of the United States are, nor a "Circuit Court of Appeals of the United States" within the meaning of the Federal Trade Commission Act. We admit the fact to be that, while Congress doubtless meant to confer jurisdiction on the Court of Appeals of the District of Columbia to review and pass upon the Commission's determinations in matters arising in the District, yet it has not used apt language to accomplish that purpose; and that, owing to the peculiar situation existing in the District of Columbia, and the radical differences between the two judicial systems, as heretofore pointed out, the requisite language to confer jurisdiction may not be read into the Act in question. Heretofore, when Congress has meant to clothe the Court of Appeals of the District of Columbia with special jurisdiction, it has found and used language adequate to do so; and, we submit, its oversight cannot be corrected by the Courts.

In support of the foregoing contentions, we solicit the court's attention to the following authorities:

In the case of *James, Administratrix, v. United States*, 202 U. S., 401, 50 L. Ed., 1079, the widow of the late Justice Charles P. James, Associate Justice of the Supreme Court of the District of Columbia, brought suit in the Court of Claims for certain salary due her deceased husband after his retirement from the bench. The Government contended that Mr. Justice James was not entitled to retirement pay because he was not a member of a *court of the United States* within the meaning of Article III, sec. 1 of the Constitution; but this court expressly refused to pass upon that point and held that the Supreme Court of the District of Columbia was a *court of the United States*, and that its retired members were entitled to retired pay within the statute

providing such pay *"when any judge of the United States* resigns his office," etc.

While the last-mentioned case did not decide the question raised, this court had theretofore done so in the case of *Embrey v. Palmer*, 107 U. S., 3, 27 L. Ed., 346. There, it was sought to enjoin by a proceeding in equity the collection in Connecticut of a judgment at law obtained in the District of Columbia. This Court, Mr. Justice Matthews delivering the opinion, held—

> " * * * That the Supreme Court of the District of Columbia is a court of the United States, *results from the right which the Constitution has given to Congress of exclusive legislation over the District;*"

and that the judgment in question was entitled to full faith and credit in Connecticut.

There are numerous cases holding that the courts of the District of Columbia are "courts of the United States;" but we are unable to find one holding that the Supreme Court of the District of Columbia is a *District* Court of the United States, or that the Court of Appeals of the District of Columbia is a *Circuit Court of Appeals* of the United States. And we confidently believe no such cases are to be found.

To say that the Court of Appeals of the District of Columbia is a "Circuit Court of Appeals of the United States," without more authority than is found in the Federal Trade Commission Act, would be the same as saying that, because Congress has expressly and in apt language conferred concurrent jurisdiction upon the United States District Courts and the Court of Claims in sum not exceeding ten thousand dollars, the District

Courts are Courts of Claims, or that the Court of Claims is a District Court of the United States. Even if Congress had used apt language to confer special jurisdiction on the Court of Appeals of the District of Columbia to review decisions of the Federal Trade Commission, that court would in no sense be a "Circuit Court of Appeals of the United States."

We think the question here involved has already been decided by this Court in no uncertain terms, in the case of *Chapman vs. United States*, 164 U. S., 436. Chapman had been indicted in the Supreme Court of the District of Columbia for a supposed violation of Section 102 Revised Statutes, in refusing to answer questions propounded to him by a Senate sub-Committee investigating charges with a view to the enactment of remedial legislation. He demurred on the ground, among others, that said Section of the Revised Statutes was unconstitutional, his demurrer was overruled and the action in overruling it was affirmed by the Court of Appeals. He was tried and convicted, and his conviction was likewise affirmed by the Court of Appeals, whereupon a writ of error was allowed by the Supreme Court, which writ the Government moved to dismiss. It was contended on behalf of Chapman that this court had jurisdiction to review the case under Sec. 5 of the Judiciary Act of 1891 (26 Stat. L., 827) providing for appeals and writs of error from the district courts or from the existing circuit courts of the United States in cases (1) of conviction of a capital or otherwise infamous crime; (2) in any case that involves the construction or application of the Constitution of the United States; (3) in any case in which the constitutionality of any law of the United States, or any treaty, is drawn in question; and (4) where the constitutionality of a law of any

state is claimed to be in contravention of the United States Constitution. Mr. Chief Justice Fuller, in deciding against that contention said:

> "The argument is pressed that as by Sec. 5 of the Judiciary Act of 1891, cases of conviction of capital or otherwise infamous crimes; cases involving the construction or application of the Constitution of the United States; or cases in which the constitutionality of any law of the United States is drawn in question,—can be brought to this court directly from the district and circuit courts of the United States, therefore this section should be construed as giving the same right of review in the District of Columbia.
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> But we think the section too plain to admit of this. *No mention of the courts of the District of Columbia is made in the Act of March 3, 1891, and there is nothing in the 8th section to justify its expansion so as to embrace the provisions of that act. Re Heath*, 144 U. S., 92. (Italics ours.)

In Re Heath, 144 U. S., 92, 36, L. Ed., 358, this court construed section 5 of the Judiciary Act of 1891, and held it inapplicable to the District of Columbia, Chief Justice Fuller saying:

> "* * * By sections 5 and 6 cases of conviction of a capital or otherwise infamous crime are to be taken directly to this court, and all other cases arising under the criminal laws to the circuit courts of appeals. Sections 13 and 15 refer to appeals and writs of error from the decisions of the United States Court in the Indian Territory and the judgments, orders, and decrees of the su-

preme courts of the Territories. *No mention is made of the Supreme Court of the District of Columbia, and we perceive no ground for holding that the judgments of that court in criminal cases were intended to be embraced by its provisions.*"

In *Cross v. United States*, 145 U. S., 572, 36 L. Ed., 821, writ of error was granted to the Supreme Court of the District of Columbia to review the judgment of that court convicting Cross of first degree murder. In granting a motion to dismiss the writ, Chief Justice Fuller said:

> "We have, of course, no general authority to review, on error or appeal, the judgments of the circuit courts of the United States in cases within their criminal jurisdiction, or those of the Supreme Court of the District of Columbia or of the Territories; *and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language. Farnsworth v. Montana*, 129 U. S., 104; *U. S. v. Sanges*, 144 U. S., 310; *U. S. v. Moore*, 7 U. S., 3 Cr., 159.

Even a casual reading of the Judicial Code of 1911 will show that the Supreme Court of the District and the Court of Appeals are clearly differentiated and distinguished from the District and Circuit Courts of Appeals of the United States; and it is manifest that they are purposely separate in their designations and jurisdictions because of the different provisions of the Constitution under which they are formed. Section 238 of the Judicial Code authorizes direct appeals in certain cases to the Supreme Court from the District Courts, including the District Courts of Hawaii and Porto Rico,

thus embracing by general description all of the courts of the United States which could be known as District Courts. To demonstrate conclusively that Congress does not regard the Court of Appeals of the District of Columbia as a "Circuit Court of the United States," reference is made to Section 238 of the Judicial Code as well as to Section 250 thereof, wherein radically different provisions obtain for appeals from the Courts of the United States outside the District of Columbia and those declared appealable from the District of Columbia Courts. This is a further evidence that the courts of the District, while Courts of the United States, are not such courts within the accepted meaning of the term, but are in reality different judicial tribunals created under a separate and distinct power and having almost exclusively different powers and functions. A comparison of those sections afford a striking example of the fact that the courts of the District of Columbia are, and always have been, the objects of special legislation owing to the peculiar and anomalous situation of the District of Columbia, as territory separate and apart from any state, and made so by the Constitution.

One further illustration of the constant state of mind of Congress in regarding and treating the courts of the District of Columbia as separate and distinct from the other courts of the United States is found in the bankruptcy Acts. Those Acts expressly make the District Courts of the United States bankruptcy courts; and, if the Supreme Court of the District were a District Court of the United States, then it would have been unnecessary for Congress to declare, as it has, that the District Courts, *the Supreme Court of the District of Columbia, and* certain mentioned territorial courts are made bankruptcy courts.

In the case of *Swift & Co. v. Hoover*, 242 U. S., 107 61 L. Ed., 175, Hoover had, after trial in the Supreme Court of the District of Columbia, been adjudged not to be a bankrupt, and Swift & Company prosecuted an appeal and writ of error direct to this Court, contending that, under the provisions of the Bankruptcy Act such direct review was authorized and directed. After holding that such a question did not involve a controversy arising in a bankruptcy proceeding, within the meaning of the law, Mr. Chief Justice White concluded with this language:

> *"It may be true that Congress has failed to give an appellate review in proceedings in bankruptcy from the Supreme Court of the District of Columbia from a decree with reference to an adjudication in bankruptcy, but, as observed in the Tefft, W. & Co. case, that does not give this court authority to assume jurisdiction not given to it by law."*

That decision was rendered, and the foregoing language used, in the face of the statute which provided:

> *"The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings,* from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; *and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States* and *from the Supreme Court of the District of Columbia."* (Sec. 252, Judicial Code.)

Could there be found a plainer declaration that the courts of the District of Columbia are not within "any

organized circuit of the United States?" And could one wish for a plainer recognition by the Courts of the District of Columbia as comprising an entirely separate judicial system from the other United States Courts.

The Swift-Hoover case is similar to, and expressly approves and follows, the case of *Tefft v. Mansuri*, 222 U. S., 114.

POINT II.

The Commission's Authorities Analyzed and Discussed.

In the case of *The Steamer Coquitlam*, 163 U. S., 346, 41 L. Ed., 184, this court considered the question as to whether the Circuit Court of Appeals for the Ninth Circuit had jurisdiction to review on appeal a decision of the District Court for the Territory of Alaska. It was held (1) that the Circuit Court of Appeals could not accord such review in virtue of the general appellate jurisdiction given it over the United States District and Circuit Courts mentioned in the Act of March 3, 1891, because the District Court of Alaska *was not a constitutional court* within the meaning of Article III, Sec. 1 of the Constitution; but, (2) that such review might be had under Sec. 15 of the Act of 1891, which authorized such review in instances where the Supreme Court of the United States had assigned the court of a territory to any certain Circuit Court of Appeals. The courts of Alaska had been so assigned by this court by its order of May 11, 1891, to the Ninth Circuit. Inasmuch as this case is a clear recognition that the United States District and Circuit Courts of Appeals are "constitutional courts" in the strict sense, and that those of the territories and of the District of Columbia are

not; and, inasmuch as the case is distinguishable in facts, namely, that this court had authority to assign, and had assigned, the courts of the Territory of Alaska to the Ninth Circuit, we are unable to see wherein it supports the Commission's contentions here. Certainly, there is no authority for the assignment by this court, or by any other agency, of the Court of Appeals of the District of Columbia to any one of the nine judicial circuits comprising the courts of the United States; nor has any such assignment ever been directed by Congress.

The case of *Craig v. Hecht*, 263 U. S., 255, 68 L. Ed., 293, is not authority for the contentions here urged by the Commission, for there the only questions presented were: (1) Whether a Circuit Judge duly designated, pursuant to law, could and did act in a habeas corpus matter as a Circuit or District Judge; (2) whether the law abolishing the old Circuit Courts' appellate jurisdiction and conferring it upon the Circuit Courts of Appeals and the Supreme Court abrogated, by implication, the right of appeal in a habeas corpus proceeding. The case simply holds that the repeal of a law giving such right is not to be *implied*, and that if Congress had meant so to do it would have said so in plain words.

We likewise fail to see wherein the case of *Keller v. Potomac Electric Power Company*, 261 U. S., 427, 67 L. Ed., 731, has any particular application to the question here presented. In that case Congress in the clearest and most explicit language vested in the Supreme Court of the District of Columbia the power and authority to supervise and modify the elements of worth and value of the public utilities as fixed by the Public Utilities Commission of the District; and this court

held merely that the grant of power was valid under the provisions of Article I, Sec. 8, Clause 17 of the Constitution, which means that, as to the District, Congress possesses not only the power which belongs to it in respect of territory within a State, *but the power of the state as well.* We have no difference of opinion with counsel for the Commission as to the power of Congress to confer jurisdiction on the Court of Appeals to review the decisions of the Federal Trade Commission, but we insist that Congress has simply failed to do so; and, it seems to us that the *Keller-Potomac Power* case is an example of how it should and must have been done —in clear and unequivocal language. The *Keller* case held, however, that the provision authorizing an appeal to this Court was void, on the ground that such "legislative and administrative jurisdiction" cannot be conferred on the Supreme Court either directly or by appeal.

In the case of *Hyattsville Building Association v. Bouic*, 44 App. D. C., 408, the court construed Sec. 265 of the Judicial Code of the United States as binding on the Supreme Court of the District of Columbia. That section ordains that "the writ of injunction shall not be granted by *any court of the United States* to stay proceedings in any court of a state, except in cases where such injunction may be authorized" by any bankruptcy law. Of course, the Supreme Court of the District of Columbia is a *court of the United States*, and the section of the Judicial Code in question being not locally inapplicable to the District of Columbia, it was properly binding on that court; but there is no analogy to the case at bar.

The same may be said of the case of *U. S. v. B. & O. R. R. Co.*, 26 App. D. C., 581, for there it is held merely

that the Supreme Court of the District of Columbia is a United States Court within the meaning of the Safety Appliance Acts which authorize suits for the collection of penalties for its violation. Of course, inasmuch as the Safety Appliance Act is applicable to the District of Columbia, and the judges of the Supreme Court of the District are expressly given the same powers and Jurisdiction exercised by the Circuit and District Judges of the United States, in addition to their general powers (Code, D. C., sec. 62), the Supreme Court of the District had power to entertain the suit and jurisdiction to determine it. Furthermore, Sec. 64 of the District Code expressly provides that among the several justices of the Supreme Court there shall be held several terms of the Court, including "the District Court of the United States." The B. & O. case is but another instance of the application of a statute by the Supreme Court of the District not locally inapplicable to the District; but there is no such provision of law in respect of the Court of Appeals, the jurisdiction of which is limited to its general appellate jurisdiction and to a few specifically-conferred instances of original jurisdiction. We submit the B. & O. case is no authority for the proposition that original jurisdiction may be conferred upon the Court of Appeals without an express enactment by Congress containing apt language to accomplish such purpose.

As to the case of *Benson v. Henkel*, 198 U. S., 1., of course the Supreme Court of the District of Columbia is a "court of the United States" within Section 1014 of the Revised Statutes relating to the apprehension and removal of persons charged with the commission of crimes elsewhere, not only because the language of the section is all-embracing, and includes *all courts of*

the United States, but, as well, because Sections 930 and 931 of the Code of Law for the District of Columbia provide in express terms for the apprehension and delivery of such persons.

It is respectfully submitted that the Court of Appeals of the District of Columbia is not a "Circuit Court of Appeals of the United States" within the meaning of the Federal Trade Commission Act; that there is nothing in that or in any other act which makes it a part of the general judicial system of the United States, even to the extent that the Supreme Court of the District of Columbia and the courts of the Territories are made parts of the said general judicial system; and, we respectfully submit, the original jurisdiction here sought to be devolved upon the Court of Appeals of the District of Columbia can only be so devolved and granted by and through the use of plain and unequivocal language. Congress is presumed to know its wishes, and is able to use language to express them in the form of legislation, as it has always done when it desired to confer jurisdiction on any court; and if it intended to confer jurisdiction here, and failed to use language appropriate to that end, then it is not for the court to supply the omission of Congress. The act here being considered is not the first instance of Congressional oversight, and in many instances the courts have refused, and properly, too, to supply such deficiencies.

It is respectfully submitted that the decision of the Court of Appeals of the District of Columbia should be affirmed.

Respectfully submitted,

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